

NO. 03-18-00153-CV

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT OF APPEALS
OF TEXAS AT AUSTIN

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TEXAS DEPARTMENT OF TRANSPORTATION,

JEFFREY D. KYLE
Clerk

Appellant,

V.

ALBERT LARA, JR.,

Appellee.

On Appeal from the 353rd District Court of Travis County, Texas;
Cause No. D-1-GN-16-005836; the Honorable Jan Soifer, Presiding

**MOTION FOR REHEARING OF APPELLANT
TEXAS DEPARTMENT OF TRANSPORTATION**

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ISSUES PRESENTED

1. Whether the majority erred in determining that Lara was a qualified individual when it is undisputed that at the time of his separation Lara could not perform essential functions of his job, had not been medically cleared to undertake any work at all, had not been in the office for five months and doctors had already postponed his scheduled return date on two occasions, and doctors indicated that he would need a major follow up surgery within days of his latest anticipated return date.
2. Whether the majority opinion in failing to dismiss Lara's claims related to intentional discrimination for failure to provide extended medical leave, failure to transfer to a vacant position, failure to provide light or modified duties, and to the termination of his employment.

TO THE HONORABLE COURT OF APPEALS:

The Texas Department of Transportation (“TxDOT”) submits this motion for rehearing in response to the opinion issued by this Court styled [*Texas Department of Transportation v. Albert Lara, Jr.*](#), No. 03-18-00153-CV, 2019 WL 2052930 (Tex. App.—Austin, May 9, 2019, no pet. h.). TxDOT does not challenge the court’s decision to dismiss Albert Lara, Jr.’s (“Lara”) retaliation claims but requests a rehearing on the ruling that a trial court has jurisdiction over Lara’s claim that TxDOT discriminated against Lara by failing to provide a reasonable accommodation. Chief Justice Rose issued a concurring and dissenting opinion dismissing all claims for lack of jurisdiction with which TxDOT agrees.

ARGUMENT

- I. The majority erred in determining Lara was qualified at the time of his separation.**
 - A. Lara has not established a prima facie case since it is undisputed that Lara was not released to return to work of any kind at the time of his separation and there is no evidence that additional leave would have rendered him qualified for his position.**

The majority opinion states that “it is undisputed that in September of 2015, Lara could not perform the essential functions of a general engineering technician without an accommodation and had not been medically cleared to undertake work of any kind.” [*Lara*](#), 2019 WL 2052930 at *6. It goes on to conclude that a jury should determine if the “requested” accommodation of additional leave rendered Lara

qualified “because eventually he would have been healthy enough to perform the essential functions of his job.” *Id.* This is contrary to current case law, including the case law cited by the majority, and would flood trial courts with failure to accommodate claims anytime unqualified plaintiffs are not offered leave without pay (“LWOP”) after their Family Medical Leave (“FML”) expires. In theory, any plaintiff could argue that LWOP would eventually render them healthy enough to perform job duties. This would render the “qualified” prong meaningless.

Courts have held that a plaintiff unable to perform essential functions at the time of separation is not qualified. See [*Tex. Parks & Wildlife Dep’t v. Gallacher*](#), No. 03-14-00079-CV, 2015 WL 1026473, at *4-6 (Tex. App.—Austin Mar. 4, 2015, no pet.) (mem. op.) (Plaintiff did not establish a prima facie case because she did not show she was a qualified individual since she attested to her inability to perform her job at the time of her separation); [*Tex. Dep’t of State Health Servs. v. Rockwood*](#), 468 S.W.3d 147, 156 (Tex. App.—San Antonio 2015, no pet.) (evidence conclusively negated plaintiff was qualified at the time of her termination in October when she had an accident in September, surgery in December and was not released to work until March of the next year); [*Amsel v. Tex. Water Dev. Bd.*](#), 464 F. App’x 395, 400 (5th Cir. 2012) (evidence undisputedly reflected the employee was unable to come to work at the time of the separation thus the court held the employee was not a “qualified individual” since he had not been in the office for five months and

the amount of leave needed was indefinite in nature); [*Dep't of Aging & Disability Servs. v. Comer*](#), No. 04-17-00224-CV, 2018 WL 521627, at *7 (Tex. App.—San Antonio Jan. 24, 2018, no pet.) (where the court reversed the denial of a plea and dismissed all claims after finding plaintiff was not qualified and no reasonable accommodation was possible); [*Cortez v. Raytheon*](#), 663 F. Supp. 2d 514, 521 (N.D. Tex. 2009) (holding a plaintiff unable to attend work is not a “qualified individual with a disability” under ADA); [*Moss v. Harris Cty. Constable Precinct One*](#), 851 F.3d 413, 417 (5th Cir. 2017) (where plaintiff exhausted all FML leave and doctor could not release plaintiff to work for another month, he was medically incapable of performing duties at the time of termination and not qualified). Since it is undisputed Lara was not medically cleared to perform work of any kind on September 16, 2015, and he was incapacitated through November with a follow up surgery estimated November 7, 2015, Lara was not a qualified individual with a disability under ADA. Lara did not provide any evidence that he was actually released to return to work October 21, 2015 and it is undisputed that he did not return to work of any kind until August 2016. CR 122, 126. Thus, Lara failed to establish a prima facie case by failing to show he was qualified at the time of his separation and/or that additional leave would have rendered him qualified for his position.

The cases cited by the majority seem to be in line with TxDOT’s arguments. See [*Van Wagenen v. Nielsen*](#), 749 F. App’x 606 (9th Cir. 2019) (Court upheld district

court's dismissal because plaintiff failed to raise a genuine dispute of material fact as to whether she could perform the essential functions of her job); [*Graves v. Finch Pruyn & Co.*](#), 353 F. App'x 558, 560 (2nd Cir. 2009) (Court concluded plaintiff failed to make a prima facie case that the requested two weeks unpaid leave would allow plaintiff to perform essential functions of his job); [*Willard v. Potter*](#), 264 F. App'x 485, 488 (6th Cir. 2008) (plaintiff failed to establish a prima facie case when she was unable to identify a position in which she was qualified to work); *See also* [*Weyer v. Twentieth Century Fox Film Corp.*](#), 198 F. 3d 1104, 1112 (9th Cir. 2000) (A "qualified individual" is an employee who "must be able to perform the essential functions of employment at the time that one is discriminated against in order to bring suit").

Employers are liable only for discrimination that occurs "because of or on the basis of a physical or mental condition that *does not* impair an individual's ability to reasonably perform a job." [Tex. Labor Code 21.105](#) (emphasis added). The majority opinion already concluded that Lara has "produced no evidence of any negative attitude, departure from policies, or differential treatment." [Lara](#), 2019 WL 2052930 at *19. TxDOT presented a legitimate, non-discriminatory reason for the separation and Lara presented no competent evidence of pretext. TxDOT merely separated the only inspector in the 16-person County Maintenance Office after five months of absence, after all of his personal leave was exhausted and maximum SLP

hours were granted and also exhausted, after he missed two previously scheduled return dates, and with knowledge that he was subject to a follow up surgery yet to be scheduled and that additional leave would be required within days of his latest anticipated return date. It is undisputed that at the time of his separation, Lara had a 12-inch incision in his abdomen, a catheter, several drains, and that he required home health care workers to come once a week to treat him. CR 436. It is also undisputed that Lara had a physically demanding job as the only inspector in the Milam County Maintenance Office. CR 85-89. There was no indication at the time of his separation on September 16, 2015 that additional leave or any other accommodation would render him qualified for his position. Thus, the court should dismiss his discrimination claim for failure to accommodate.

B. Lara was not qualified for his position and, considering all facts and circumstances, additional leave was not reasonable.

Since Lara cannot establish that he was qualified at the time of separation, the analysis should end there. However, TxDOT will also address how Lara failed to establish the third prong of the prima facie case—that TxDOT failed to make “reasonable” accommodations. The majority opinion notes that the reasonableness of a leave request must be considered in light of all the facts and circumstances but then only cites Lara’s lengthy tenure with TxDOT as a satisfactory employee and the fact that TxDOT’s personnel manual allows “supervisors the discretion to grant unpaid leave for up to one year.” *Lara*, 2019 WL 2052930, at *10. To clarify,

TxDOT's manual allows a District Engineer, not any supervisor, the ability to review any formal written requests for LWOP. CR 104-05, 109. After the request is received, the District Engineer may grant, deny, or administratively separate an employee rather than grant LWOP. *Id.* Surely the majority does not mean to imply that there will always be a fact issue as to whether or not an accommodation is reasonable if the plaintiff is a long-term employee in good standing and/or the options for potential accommodations are presented in a personnel manual.

The majority fails to address the following undisputed facts and circumstances that render the additional leave unreasonable: 1) there is no evidence that Lara was medically released to return to work after five weeks, or that he was qualified to return to his physically demanding position before or after his follow up November surgery; 2) All Lara's personal leave expired by May 5, 2015, and TxDOT provided LWOP and additional paperwork on numerous instances to provide Lara with the maximum amount of SLP hours allowed by law, even beyond the expiration of FML;¹ 3) Lara's FML expired on July 15, 2015, and at that time doctors indicated that he could return to work on July 20, 2015, therefore TxDOT continued his employment in hopes that he could return, only to find out on July 15, 2015 that he would not be released to return to work until October 21, 2015 with a November 7,

¹ CR 52-54.

2015 surgery; rather than terminate Lara in July, TxDOT allowed the remaining balance of SLP hours to go to Lara in hopes that he would be able to return but that was not the case as of September 16, 2015;² 4) TxDOT has a specific policy to request LWOP, TxDOT provided that policy to Lara on July 10, and Lara failed to request LWOP as per the policy or fill out any other paperwork after that July 10 letter was sent;³ 5) Lara was told on multiple occasions that Human Resources and the District Engineer would make all decisions and was instructed to call them but he never did; 6) there is no evidence that Lara called or made a specific request for LWOP or any accommodation after he received the September 9, 2015 letter that he would be separated, rather, he only contacted staff about his paystub information;⁴ 7) this is not a case in which Lara was clearly communicating with TxDOT on any specific accommodations leading up to his September separation; the only evidence that he provided is that TxDOT knew he needed at least six months of leave based on a doctor's note that was turned in July 15, and he allegedly told an assistant supervisor and an office manager that he wanted to keep his job; he then filed a lawsuit accusing TxDOT of failing to provide a number of accommodations that he

² CR 54.

³ The July 10, 2015 letter informed Lara of FML expiring July 15 and asked him to request additional SLP and LWOP; however, the last SLP request form Lara filled out was signed by him on June 30, 2015 which would have been prior to TxDOT informing him of his responsibility to request additional leave. CR 54, 472.

⁴ CR 136.

never requested; 8) when he called the assistant supervisor or office manager they directed him to keep up with all paperwork and call the District Engineer or HR, which he did not do; 9) the anticipated return to work date had been postponed three times and anticipated an extensive follow-up surgery within days of an anticipated release and with unknown recovery time; the amount of leave needed was indefinite in nature and thus unreasonable; 10) under FML an employee is entitled to 12-weeks leave and TxDOT allowed more than 22 weeks; and 11) there was an undue burden on the Milam County Maintenance Office to be without its only inspector for more than five months. These are the total facts and circumstances that show TxDOT was trying to and did accommodate Lara, that TxDOT did not separate as soon as FML expired in July 2015, and that the additional leave needed with a follow-up surgery to be scheduled was not a reasonable accommodation.

The Fifth Circuit acknowledged that, although taking limited leave of a definite duration may be a reasonable accommodation, an employer is not expected to wait indefinitely for all conditions to be corrected. See [Moss](#), 851 F.3d at 419; [Rogers v. Int'l Marine Terminals, Inc.](#), 87 F.3d 755, 760 (5th Cir. 1996). A reasonable accommodation is by its terms that which *presently or in the immediate future* enables the employee to perform the essential functions of the job in question. [Moss](#), 851 F.3d at 419. Several U.S. District Courts have also held that in many circumstances, unpaid leave is not a reasonable accommodation. See [Molina v. DSI](#)

[*Renal, Inc.*](#), 840 F. Supp. 2d 984, 1002 (W.D. Tex. 2012) (holding additional medical leave is not a reasonable accommodation when plaintiff had not yet scheduled a date for a follow up surgery); [*Hester*](#) 2013 WL 4482918, at *7-8 (additional eight weeks of leave after FML expired to recover from foot surgery not reasonable, not obvious that employer should understand a faxed note from the doctor as a request for accommodation); [*Salem v. Hous. Methodist Hosp.*](#), No. 4:14-1802, 2015 WL 6618471, at *7-8 (S.D.Tex. 2015).

The majority opinion essentially states that an employer must offer LWOP to any employee who has been out on any amount of medical leave as a reasonable accommodation even if the employee has exhausted all personal leave, FML, and the maximum amount of SLP allowed by law; this would be required even if the employer has a procedure for the employee to request LWOP and that procedure was explained and provided to the employee but the employee did not follow that procedure.

It is unreasonable to require an employer to hold open a position and automatically provide LWOP whether or not requested anytime there is a doctor's note on file with the employer with a potential return date, no matter how many times that date has been postponed or what follow-up surgeries have been indicated. This goes beyond requiring an employer to engage in the interactive process and instead places an unreasonable burden on the employer to come up with an accommodation

or provide LWOP without an employee request. On the contrary, it is “the plaintiff [who] has the burden to request reasonable accommodations; she cannot expect the defendant to have ‘extra-sensory perception’ about accommodations that would allow her to perform the job’s essential functions.” [*LeBlanc v. Lamar State Coll.*](#), 232 S.W.3d 294, 300 (Tex. App.—Beaumont 2007, no pet.) (citing [*Burch v. City of Nacogdoches*](#), 174 F.3d 615, 619 (5th Cir. 1999); [*Burch v. Coca-Cola, Co.*](#), 119 F.3d 305, 319 (5th Cir. 1997)). A blanket requirement that an employer must grant unpaid leave when an employee is out of medical leave beyond 12 weeks FML and 720 hours of paid sick leave “is beyond the scope of the ADA when the absent employee simply will not be performing the essential functions of her position.” [*Walton v. Mental Health Assoc.*](#), 168 F.3d 661, 671 (3rd Cir. 1999). When the responsibility for the breakdown in the interactive process is traceable to the employee, the employer has not violated the ADA. [*Hagood v. Cty. of El Paso*](#), 408 S.W.3d 515, 525 (Tex. App.—El Paso, 2013, no pet.) (citing [*Loulseged v. Akzo Nobel, Inc.*](#), 178 F.3d 731, 736 (5th Cir. 1999)).

C. TxDOT established an undue burden, and business necessity to replace Lara’s position.

TxDOT demonstrated that allowing additional unpaid leave beyond the five months it had already provided was an undue hardship since the leave and limitations were indefinite in nature and since Lara was the only inspector in the Milam County office, which was a full-time position. CR 169-70. The fact that a general technician

and the crew chief were covering most of Lara's duties placed additional strain and duties on the remaining crew to operate more equipment and perform additional duties. CR 140. The ADA does not require an accommodation that would result in other employees having to work harder or longer hours. [*Turco v. Hoechst Celanese Corp.*](#), 101 F. 3d 1090, 1094 (5th Cir. 1996). [*Munoz v. H & M Wholesale, Inc.*](#), 926 F. Supp. 596, 607–08 (S.D. Tex. 1996).

Missing someone from a 16-person crew that was responsible for covering the safety and road repair of 1,017 miles of roadway within Milam County for over five months with an undetermined amount of additional recovery from a second surgery created an undue burden on TxDOT. “Any cost in efficiency or wage expenditure that is more than *de minimis* constitutes undue hardship.” [*Favero v. Huntsville Indep. Sch. Dist.*](#), 939 F. Supp. 1281, 1288-89 (S.D. Tex. 1996) (holding an employer established an undue hardship over an eight-day absence) (quoting [*Mann v. Frank*](#), 7 F.3d 1365, 1370 (8th Cir. 1993)). The loss of production that results from not replacing a worker can amount to an undue hardship. *Id.*; see also [*Pickard v. Potter*](#), No. 4:01-CV-0375-BE, 2003 WL 21448593, at *6 (N.D. Tex. 2003) (granting employer's motion for summary judgment when employee was unable to perform essential job functions and no reasonable accommodation would have allowed her to do so when the only possible accommodation that could have been made,

reasonable or otherwise, would have been to reassign the employee's entire job to another person until her doctor determined she was again able to work).

TxDOT was unable to post a position or promote anyone to the only contractor inspector position in the Milam County office since it was considered occupied while Lara was out on leave. CR 142. There is undisputed evidence that having technicians cover contracts and cover multiple duties over a four to five-month period had taken a toll on the office and that Powell wanted to be fully staffed with the winter season approaching and an anticipated increase in after-hours emergency work due to weather related issues. CR 142.

The majority seems concerned that as of September 2015, TxDOT had two of the ten general technician positions vacant in the Milam County office, but as explained, one had only recently become vacant as a result of an employee transfer in July and the other became vacant in August. Both replacements were hired from an August 4, 2015 job posting and the office was fully staffed by October with the acting inspector from the previous five months taking Lara's position and the ability to hire another general technician to fill the void that the acting inspector left with the crew. CR 141. The majority opinion's only other cite to competing evidence on hardship is to Lara's affidavit indicating that his co-workers were covering Lara's

duties and that they were “understanding and supportive of him.”⁵ Surely the court is not suggesting that employers encourage co-workers or supervisors to reach out to employees on medical leave to list extensive hardships, additional daily duties or deadlines missed, or additional work on others in order to establish or defend an undue burden or hardship.

II. The majority opinion erred in failing to dismiss Lara’s claims related to intentional discrimination for failure to provide extended medical leave, failure to transfer to a vacant position, failure to provide light or modified duties, and the termination of his employment

For reasons pointed out in TxDOT’s prior briefing, there is no jurisdiction over additional claims Lara is attempting to bring such as failure to accommodate by failing to provide extended sick leave, a transfer, modified or light duties, and his termination being based on intentional discrimination. In the event that TxDOT must defend itself to a jury on the “requested” LWOP issue, it should not be forced to address the kitchen sink claims Lara attempts to bring in his petition.

PRAYER

The State respectfully requests that the motion for rehearing be granted and the judgment of the trial court be reversed for all claims. The State also request such further relief, general or special, to which it may be justly entitled.

⁵ The majority opinion states Lara produced emails and text messages that corroborate co-workers were supportive of Lara’s additional leave but TxDOT is unaware of any such production.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the above computer-generated document contains a total of 3,371 words, not counting the caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of issue presented, signature, certificate of compliance, certificate of service, and appendix, as counted by the program creating said document.

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CERTIFICATE OF SERVICE

I certify that on the 10th day of June, 2019, I served a copy of this ***Motion for Rehearing of Appellant Texas Department of Transportation*** on the following parties in accordance with the Texas Rules of Appellate Procedure:

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